IN THE

SUPREME COURT OF THE UNITED STATES

NO. 78-243

MARTIN THEATRES OF TEXAS, INC.
Petitioner

VS.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, WARREN G. HARDING, STATE TREASURER AND JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents

On Petition For a Writ of Certiorari To the Supreme Court of Texas

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Brief for Respondents in Opposition

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Respondents, Bob Bullock, Comptroller of Public Accounts, Warren G. Harding, State Treasurer and John L. Hill, Attorney General of the State of Texas, respectfully submit the following brief in opposition to the issuance of a writ of certiorari as prayed for by Petitioner.

QUESTIONS PRESENTED

Petitioner presents two questions:

1. Whether the Texas Limited Sales, Excise and Use Tax Act, Art. 20, Title 122A, Taxation-General, 20A V.T.C.S., violates the equal protection clause of the

Fourteenth Amendment in taxing the leasing of motion picture films by motion picture theatres and others while exempting leasing of motion picture films by television stations.

2. Whether the imposition of the Texas Limited Sales, Excise and Use Tax Act upon Petitioner penalizes Petitioner for successfully challenging the constitutionality of a section of the Texas Admissions Tax Act and violates the equal protection and due process clause of the Fourteenth Amendment.

ARGUMENT

The Fourteenth Amendment to the United States Constitution provides ". . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law."

"[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). "The prohibition of the Equal Protection Clause goes no further than invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). This Court set out the limitation that the Equal Protection clause imposes on the State's power to tax in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937). Taxpayers employed more than eight employees and so were subject to a state occupation tax. In response to the contention that the tax violated the Fourteenth Amendment, the Court wrote:

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation . . . This Court has repeatedly held that inequalities

> which result from a singling out of one particular class for taxation or exemption infringe no Constitutional limitation . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it . . . at 509.

It is plain that the Fourteenth Amendment poses only minimal restraints on a state's power to tax, and will not invalidate a classification except in extraordinary situations. The burden is on the person attacking the statute who must negative every conceivable basis which might support the legislative arrangement. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). The legislatures "are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in sone inequality." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

In a recent ad valorem tax case this Court wrote:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. * * * Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produces reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

Lehnhausen also cited *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959):

> "Of course, the States, in the exercise of thier taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." At 526-527.

Since ad valorem taxes are those taxes most subject to the requirements of equal protection and excise taxes are subjected to much less stringent standards, it would seem that only an extreme exercise of palpably arbitrary discrimination against a class would offend the federal constitution. One writer concluded that "the right of a state to exempt specific items of property or specific transactions from such [sales or use] taxes appears to have few constitutional or legal requirements. Brabson, Analysis of Sales and Use Tax Exemption — with Comment as to More Uniform Application, 9 Vand.L.Rev. 294, 310 (1956). This Court commented that it has "repeatedly held that inequities which result from the singling out of one particular class for taxation exemptions infringe no constitutional limitations." *Independent Warehouse, Inc. v. Scheele*, 331 U.S. 70, 86 (1947).

Testimony was offered at trial which shows that motion picture theatres in addition to exhibiting film, do have concession sales and advertise. Television stations also advertise, but cannot have concession sales since the place of exhibition is the home. However, 99.6% of

theatre revenue, whether from admissions or concessions, is derived from customers who enter to witness the exhibition of the film. Television does not derive any of its revenue from those who watch the films. The Texas Court of Civil Appeals also found that the showing of films is the sole occupation of theatres, but is incidental to a television station's principal business of news medium and exhibition of commercial and other kinds of advertising. Petitioner's Brief, B-8. These are reasonable distinctions on which the Legislature can base a classification for taxation purposes.

The fact that the exemption is based on differences in occupation rather than on differences in the sales transaction or the later use is not unusual. Texas courts as well as courts of sister jurisdictions have upheld sales tax exemptions based on classes of persons as well as exemptions based on transactions. In *American Transfer & Storage Co. v. Bullock*, 525 S.W.2d 918 (Tex. Civ. App. — Austin 1975, writ ref'd), the court upheld the exemption of tax on containers for sellers of goods when containers used by sellers of services were not exempted. New Jersey permitted the taxation of direct mail advertising services while newspaper and magazine advertising was exempted. *Fisher-Stevens, Inc. v. Director, Division of Taxation*, 298 A.2d 77 (N.J. 1972). That advertisers who sold advertising by means of billboards were not exempt from sales tax and those who sold advertising by means of newspapers were exempt was upheld as a reasonable classification by the Supreme Court of Oklahoma. *In Re Assessment of Sales Tax Against Knapp*, 95 P.2d 92 (Okla 1939). Courts have also upheld exemption for classes of persons such as people selling on an isolated basis, landlords renting two unit apartments and farmers. *Morrow V. Henneford*, 47 P.2d 1016 (Wash. 1935); *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Welch v. Sells*, 192 N.E.2d 753 (Ind. 1963). Classification for exemption by occupation as well as item sold

is not unusual in the field of Sales and Use Tax and is a legitimate basis for different tax treatment so long as there are reasonable differences in the occupations.

Petitioner's second argument is specious. Petitioner contends that Article 20.04(Z), Title 122A, Tax.-Gen., 20A V.T.C.S., unconstitutionally penalizes Petitioner for successfully contesting the Texas Admissions Tax Act. Article 20.04(Z), in addition to completely exempting television stations from payment of sales tax on motion picture rentals, also exempted motion picture theatres which were subject to admissions taxes. It is clear that the statute was designed to insure that motion picture theatres would not be inordinately burdened in the total scheme of taxation. The Legislature could have reasonable imposed both taxes on the industry without rendering either tax unconstitutional. Even should the burden be so great as to destroy the commercial or use value of the thing on which it is laid, a tax will not be deemed unconstitutional, *Lehnhausen, supra; Kathleen Citrus Land Co. v. City of Lakeland*, 169 So. 356, 358 (Fla. 1936), unless the party is engaged in performing a public service where the right to regulate has been sustained. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 91 (1901). "Where the classification is such that the individual has some control over his inclusion or exclusion therefrom, it cannot be considered constitutionally discriminatory." 71 Am.Jur.2d, State and Local Taxation, § 179; *State v. Margay Oil Corp.*, 269 S.W. 63 (Ark. 1925).

Petitioner argues that the "penalty" of increased cost of business as a result of taxation should render the tax unconstitutional. In considering the same argument for a different tax, this court rejected this rationale, reasoning that the burden of taxation is no different from other costs incurred in bringing the product to the consumer when the taxpayer is under no legal obligation to pass

the tax along to the consumer. Presumably, it could be added to the price charged the consumer as are the other costs. *Gurley v. Rhoden*, 421 U.S. 200, 211 (1975).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby depose and say that I am a member of the Bar of the United States Supreme Court and this _____ day of September, 1978, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Petitioner Martin Theatres of Texas, Inc., by depositing the same in the United States Post Office addressed to the Hon. Geo. Garrison Potts, one of its counsel of record, at his post office address, 2300 Republic National Bank Tower, Dallas, Texas, 75201

with Certified, Return Receipt Requested, first class postage prepaid.

_____

MARTHA E. SMILEY

Subscribed and sworn to before me in Austin, Travis County, Texas this _____ day of September, 1978.

_____

Notary Public
Travis County, Texas

My Commission Expires:

_____

APPENDIX

Art. 20.04(Z), Title 122A, Taxation-General, V.T.C.S.

There are exempted from the taxes imposed by this Chapter the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theatres which are subject to admission taxes as imposed by Chapter 21, Title 122A, Revised Civil Statutes of Texas, 1925, as amended, and to or by licensed television stations.